2-2200-7153-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA POLLUTION CONTROL AGENCY

In the Matter of the Solid Waste Disposal Citation Issued to John Latterner	FINDINGS OF FACT, CONCLUSIONS AND RECOMMENDATION

The above-entitled matter came on for hearing before Bruce D. Campbell, Administrative Law Judge from the Minnesota Office of Administrative Hearings, in St. Paul, Minnesota, on December 8, 1992.

Appearances: Kris Hulesbus, Special Assistant Attorney General, Suite 200, 520 Lafayette Road, St. Paul, Minnesota 55155, appeared on behalf of the Pollution Control Agency (Agency or PCA); and John Latterner, 27950 Smithtown Road, Excelsior, Minnesota 55331, appeared on his own behalf (Mr. Latterner or Appellant).

The record in this case closed on January 7, 1993, with the receipt by the Administrative Law Judge of the PCA's response to his letter of December 28, 1992.

This report is a recommendation, not a final decision. The Commissioner of the Minnesota Pollution Control Agency will make the final decision after a review of the record which may adopt, reject or modify the Findings of Fact, Conclusions and Recommendation contained herein. Pursuant to Minn. Stat. 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties at the proceeding for at least five days. An opportunity must be afforded to the party to whom the Order was issued to comment to the Commissioner within that five-day period on the recommendation. Parties should contact the office of Commissioner Charles W. Williams, Minnesota Pollution Control Agency, 520 Lafayette Road, St. Paul, Minnesota 55155-3898, (612/296-7301), to ascertain the procedure for providing comment on the recommendation contained in this Report.

STATEMENT OF ISSUE

The issue to be determined in this proceeding is whether John Latterner violated Laws of 1991, C. 347, Art. 1, 15, by disposing of solid waste at a location not authorized by law for the disposal of solid waste without permission of the owner of the property, as charged in the Notice of Solid Waste Disposal Violation, Civil Citation, and Imposition of Penalty dated September 10, 1992,

Based upon all the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. The Medicine Lake Apartments is an apartment complex located on the south or southwest bay of Medicine Lake in Hennepin County. The apartment

structure also has associated with it a large dock and docking area for water craft. In the spring of 1989, the Dock and Lift Service operated by John Latterner, 27950 Smithtown Road, Excelsior, Minnesota 55331, had been employed by the apartment management company responsible for Medicine Lake Apartments, Lake Associates, to remove a severely ice-damaged dock from the front of the apartment lakeshore and install a replacement dock. That winter's ice movement had severely damaged the docking posts and sections so that ordinary hand and barrel removal of the structure would not be possible.

2. On an unspecified date in the spring of 1989, Mr. John Amundson, a supervisor with the management firm, Lake Associates, called Mr. John Latterner to set up an appointment for him to remove the ice-damaged dock. Mr. Latterner stated he was aware that removal of the ice-damaged dock would require the use of a watercraft because of the severe ice damage to the dock. Ordinarily, and in prior years, the dock was removed in the fall and replaced in the spring by hand, using 55-gallon drums. Removing the ice-damaged dock would require a boat to be used to pull the posts and to float the damaged sections. Mr. Latterner stated to Mr. Amundson that he couldn't bring the boat he usually would use for such a dock removal to Medicine Lake because of the shallow depth of the lake near the shoreline. Ordinarily he would use a large jon boat to remove the damaged dock. Mr. Latterner stated that he would find some type of craft to bring to Medicine Lake Apartments to remove the damaged dock sections and posts.

3. On an unspecified date in the spring of 1989, a work crew arrived at the Medicine Lake Apartments to remove the damaged dock. They brought with them the pontoon boat pictured in PCA Ex. 6 and PCA Ex. 7. The pontoon boat they brought was not a pleasure craft with a platform. It was an occupational pontoon without a supporting platform. Such a pontoon is useful for dock removal since, without a platform, the craft can straddle a dock with its pontoons and the poles and dock sections can be removed. There is no evidence in the record that the pontoon boat depicted in PCA Ex. 6 and PCA Ex. 7 had any winching equipment on it.

4. Shortly after the crew began using the pontoon, it partially sank in the water. The craft was disabled because the front of the right pontoon which had an existing puncture that had been crudely repaired failed during its use.

5. In the spring of 1989, Dayle Klister was the caretaker and maintenance person at Medicine Lake Apartments. A member of the crew that was removing the dock came to Mr. Klister and explained that their craft was disabled. They asked Mr. Klister if they could borrow a small twelve-foot boat from a resident of the apartment building. The boat was moored along the shoreline at the apartment complex. Mr. Klister had been told by the management company that Mr. Latterner's crew would be at the complex that day to remove the damaged dock. Mr. Klister asked the owner of the small boat, Ruth Atlas, if it could be used in the dock removal. She gave her permission for the use of her boat but told Mr. Klister not to let the workmen use her

outboard motor. The crew finished their work using Ms. Atlas' small boat.

6. Mr. Klister, in the course of his duties, is often on the roof of the apartment building. The roof of the building gives a direct line of site to the docking area. Mr. Klister saw the work crew using the pontoon until it became disabled and also observed them using the Atlas boat to finish their work.

7. After the crew left the Medicine Lake Apartments, Ms. Atlas complained to Mr. Klister that the men had used her motor and had damaged it. Mr. Klister and the management company told Ms. Atlas to have the motor repaired and to send the repair bill to the management company.

8. On June 26, 1989, Mr. Latterner invoiced the Medicine Lake Apartments for the removal of an ice-damaged dock. His invoice was in the amount of $2,490.00. Prior to payment of Mr. Latterner's invoice, the management company, through Mr. John P. Walters, the property manager, deducted from Mr. Latterner's invoice the expenses associated with the repair of Ms. Atlas' outboard motor that had been used as described in Findings 5 and 6, supra. PCA Ex. 5. The Latterner invoice, less the expenses associated with the motor repair, were paid by Lake Associates, the management company, with check number 1293. PCA Ex. 5.

9. There is no evidence in the record that Mr. Latterner disputed the deduction from his invoice of the amount associated with the repair of Ms. Atlas' outboard motor.

10. Both Mr. Klister and Mr. Amundson had observed the lake surrounding Medicine Lake Apartments for some years in discharging their work responsibilities related to Medicine Lake Apartments. They had not seen the distinctive pontoon depicted in PCA Ex. 6 and PCA Ex. 7 prior to Mr. Latterner's crew removing the ice-damaged dock. They both observed that the partially-disabled craft was in the lake in front of Medicine Lake Apartments after the Latterner crew left.

11. Sometime after Mr. Latterner's crew removed the ice-damaged dock at Medicine Lake Apartments, but before July 28, 1989, when the outboard motor repair expenses were deducted from Mr. Latterner's invoice, as reflected in PCA Ex. 5, Mr. Amundson had occasion to speak to Mr. Latterner about the pontoon in the lake. Mr. Latterner stated that he had to get some method of putting air into the right disabled pontoon so that the craft could be removed from the lake. Mr. Latterner did not, during that conversation, deny that the boat was his.

12. In 1992, as a result of a citizen complaint, Conservation Officer Jason R. Jensen visited the Medicine Lake Apartments. He went out on the lake near the disabled pontoon and took the pictures that are reflected in PCA Ex. 6 and PCA Ex. 7. Officer Jensen is experienced in the use of watercraft and pontoon craft for both pleasure and occupational uses. In Officer Jensen's opinion, the disabled pontoon is an occupational craft that would likely be used in the removal of an ice-damaged dock.

13. Officer Jensen spoke to several persons at the apartment building, including the owner of the building, the current manager and Mr. Klister. They all told him it was their understanding that Mr. Latterner was responsible for leaving the disabled pontoon in the lake.

14. Officer Jensen, during the course of his investigation, took the pictures contained in PCA Ex. 6 and PCA Ex. 7 to the Lakeshore Equipment Company in Chanhassen, Minnesota, the company currently responsible for replacing and removing docks at Medicine Lake Apartments. Officer Jensen

showed the photos to two individuals: John Simons and Jay Miller. Both men identified the pontoon boat as belonging to Mr. Latterner.

15. On September 10, 1992, after a written warning, Officer Jensen issued a Notice of Solid Waste Disposal Violation, Civil Citation, and Imposition of Penalty to Mr. Latterner. PCA Ex. 2. Officer Jensen classified the pontoon boat as "other solid waste" and calculated its mass at 25 cubic feet. The penalty imposed in the Notice of Solid Waste Disposal Violation is $500.00, or $20.00 for each cubic foot of improperly-disposed solid waste.

16. Laws of 1 991 , C. 347 , Art. I, 1 5 , subd . 2(4) , specifi es that the penalty for the improper disposition of "other solid waste" is $1.00 per pound or $20.00 per cubic foot up to a maximum of $2,000.00.

17. By letter dated September 14, 1992, Mr. Latterner appealed the Notice of Solid Waste Disposal Violation, as provided for by Laws of 1991, C. 347, Art. 1, subd. 3.

18, The disposal of solid waste by Mr. Latterner at issue occurred in 1989. Laws of 1991 C. 347, Art. 1, 15, was only effective after August 1, 1991. The pontoon craft disposed in Medicine Lake by Mr. Latterner in 1989 was, however, still in the lake at the time of the effective date of Laws of 1991, C. 347, Art. 1, 15, August 1, 1991, and has remained in the lake at least through the hearing date herein.

19. On August 21, 1992, after the effective date of the Act, Mr. Latterner received a warning citation from Officer Jensen, giving him 24 hours to remove the pontoon from the lake. PCA Ex. 1.

Pertinent Statutory Excerpts

Laws of 1991, C. 347, Art. 1, sec. 15, subd. 1, provides:

> Pollution Control Agency staff designated by the Commissioner and Department of Natural Resources Conservation Officers may issue citations to a person who disposes of solid waste as defined in Minn. Stat. 116.06, subd. 10, at a location not authorized by law for the disposal of solid waste without permission of the owner of the property.

Laws of 1991, C. 347, Art. 1, subd. 2, provides:

> The citation must impose the following penalty amounts:
>
> (4) $1 per pound of other solid waste or $20 per cubic

foot up to a maximum of $2,000 . . . .

Based on the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Administrative Law Judge and the Commissioner of the Minnesota Pollution Control Agency have jurisdiction herein and authority to take the action proposed pursuant to Laws of 1991, C. 347, Art. 1, 15, subd. 3, and Minn. Stat. 14.50 (1990).

2. Proper notice of the hearing was timely given and all relevant substantive and procedural requirements of law or rule have been fulfilled. The matter is, theref ore, properly before the Administrative Law Judge.

3. The Agency has the burden of establishing the fact of the violations alleged by a preponderance of the evidence.

4. The Agency has established by a preponderance of the evidence that Mr. Latterner, or a crew operating under his direction and control and for his financial benefit, improperly disposed of a disabled pontoon boat in Medicine Lake in the early summer of 1989.

5. If Laws of 1991, C. 347, Art. 1, 15, subd. 2(4) were applicable to this case, the appropriate civil penalty for the illegal disposition of solid waste referred to in the previous conclusion would be $20.00 per cubic foot, or $500.00, based on a reasonable approximation of the size of the abandoned craft.

6. Laws of 1991, C. 347, Art. 1, 15, is a penalty provision which became effective on August 1, 1991.

7. Laws of 1991, C. 347, Art. 1, 15, may not be employed to impose a civil penalty on Mr. Latterner for a disposal of solid waste occurring before the effective date of the statute.

8. Waiver does not authorize the Administrative Law Judge to apply Laws of 1991, C. 347, Art. 1, 15, retroactively to Mr. Latterner's conduct.

9. Any Finding of Fact more properly termed a Conclusion and any Conclusion more properly considered a Finding of Fact is hereby expressly adopted as such.

Based on the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

The Administrative Law Judge hereby recommends to the Commissioner of the Minnesota Pollution Control Agency that he dismiss the civil penalty assessed against John Latterner for illegal disposition of a disabled pontoon craft in Medicine Lake, Hennepin County in 1989, prior to the effective date of Laws of 1991, C. 347, Art. 1, 15.

Dated this 14th day of January, 1993.

BRUCE D CAMPBELL
Administrative Law Judge

NOTICE

Pursuant to Minn. Stat. 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail.

Reported: Taped recorded; No transcript prepared.

MEMORANDUM

As stated in the Findings, the abandonment of a pontoon craft in Medicine Lake by John Latterner occurred in the late spring or early summer of 1989. The citation was not issued until 1992. The session law the PCA seeks to apply to Mr. Latterner's conduct, Laws of 1991, C. 347, Art. 1, 15, did not become effective until August 1, 1991. Because the session law does not include a specific or different effective date, it became effective by operation of law on August 1, 1991. Minn. Stat. 645.02 (1990). By letter dated December 28, 1992, the Administrative Law Judge invited the parties to address the issue of whether the session law which became effective August 1, 1991, can legally be applied to Mr. Latterner's conduct. The Administrative Law Judge concludes, for the reasons hereinafter discussed, that the civil citation issued to Mr. Latterner must be dismissed.

The Department initially argues that Mr. Latterner has waived the right to have the issue of retroactivity considered by failure to raise the issue in either his appeal letter or at the hearing. The Administrative Law Judge concludes that the issue of retroactivity has not been waived by Mr. Latterner. For the reasons discussed in an additional solid waste disposal citation opinion issued January 7, 1993, In the Matter of the Solid Waste Disposal Citation Issued to Mark Herickhoff, a copy of which is attached hereto as Exhibit A, the Administrative Law Judge has rejected the waiver argument. Under the rules of the Office of Administrative Hearings, the Administrative Law Judge has the authority to reopen a record and take additional evidence in the interest of justice. Minn. Rules pt. 8602, subp. 3 (1991); Minn. Rules pt. 1400.8606, subp. 3(j) (1991). It is also important to note that Mr. Latterner appeared in this hearing pro se. When a pro le party appears, the Administrative Law Judge has an even greater responsibility to make a complete record, including the proper application of law to fact. Casson State Bank v. Hougen, 410 N.W.2d 392, 395 (Minn. App. 1987). For these reasons, the Administrative Law Judge believes it is appropriate to consider the issue of the retroactive application of Laws of 1991, C. 347, Art. 1,

15. The opposing party, the PCA, has been afforded a full and fair opportunity to provide comment on this legal issue.

As previously stated, Minn. Stat. 645.02 provides that in the absence of a specific effective date, a session law becomes effective on August 1, next following its final enactment. Hence, Laws of 1991, C. 347, Art. 1, 15
became effective on August 1, 1991. There is no evidence in the session law that the Legislature intended that it have any earlier effective date. Minn. Stat. 645.21 (1990), provides, "No law shall be construed to be retroactive unless clearly and manifestly so intended by the Legislature." The Minnesota court has universally held that a statute will not be given any retroactive effect and is to operate prospectively only, unless the Legislature specifically and clearly states to the contrary. State v. Casualty Mutual Insurance Co., 213 Minn. 220, 6 N.W.2d 800 (1943); Murphy's Estate v. State Department of Public Welfare, 198 N.W.2d 570 (Minn. 1972). To apply the 1991 session law to conduct which occurred prior to the effective date of the act, here 1989, would give a retroactive effect to the statute. To avoid a retroactive effect, the statute must apply only to conduct occurring after the
effective date of the act. State v. Casualty Mutual Insurance Co., 213 Minn. 220, 6 N.W.2d 800 (1943); Majerus v. Walk, 275 F. Supp. 952 (D.C. Minn. 1967);
Muckler v. Buchl, 276 Minn. 490, 150 N.W.2d 689 (1967); Op. Atty. Gen. 242-A-10, March 11, 1954. Since the conduct complained of occurred prior to the effective date of the civil penalty session law and there is no evidence in the session law that the Legislature intended to apply that session law to past conduct, the civil citation penalty assessed against Mr. Latterner must be dismissed. To authorize imposition of the civil penalty would result in the session law being given a retroactive effect, in violation of Minn. Stat.
645.21 (1990).

The PCA argues that Laws of 1991, C. 347, Art. 1, 15 is not being applied retroactively, since Mr. Latterner's failure to remove the pontoon from the lake is a continuing violation, resulting in a sepakate offense each day the craft remains in Medicine Lake. The PCA relies generally on a variety
of environmental cases in which a continuing violation was found to support its argument, without critical analysis of the word "disposes" contained in the Act. The argument of the PCA would only be credible if the word "disposes" may be equated with the word "maintains", "stores" or the phrase "fails to remove."

The judicial authority relied upon by the PCA does not support its position. Most of the cases relate to an offense, such as maintenance of a nuisance which, by definition, is continuing. See, Oakwood Homeowners Ass'n v. Ford Motor Co., 258 N.W.2d 475 (Mich. App. 1977); Oakwood Homeowners Association v. Marathon Oil Co., 305 N.W.2d 567, 569 (Mich. App. 1981). Reliance is also placed on cases where the offense defined includes a particular present effect. In State v. Mauthe, 366 N.W.2d 871 (Wis. 1985), materials placed in the ground before the effective date of the penalty provision were currently leaking into neighboring properties. The court held that current leaking to be a "discharge" as statutorily defined by reference to the common meaning of the words used in the statute. Those decisions have no application to this case.

"Disposal" or "disposes" does not contain a concept of storage or maintenance in common usage. "Disposal" is the act of introducing the item or

substance into the environment or the act of discarding as waste. Stevens Creek Associates v. Barclay's Bank of California, 915 F.2d 1355, 1362 (9th Cir. 1990); Ecodyne v. Shah, 718 F. Supp. 1454, 1456 (N.D. Cal. 1989). "Disposal" or "disposes" is an historical event, not a process or continuing

condition like a nuisance. Dehart v. State, 471 N.E.2d 312 (Ind. App. 1984), relied upon by the PCA, illustrates the distinction. In that case, the defendant was charged with the continuing statutory violation of inappropriate storage, not inappropriate disposal, since the defendant's acts all occurred prior to the effective date of the act. The court upholds the penalty based on its determination that the statute's specific provisions have an "obvious intent to prevent the unauthorized maintenance of hazardous waste in a condition which does not constitute safe and proper disposal." 471 N.E.2d at 314. Laws of 1991, C. 347, Art. 1, 15 has no similar manifest intent. See, Commonwealth v. John G. Grant & Sons Co., 526 N.E.2d 768, 772-73 (Mass. 1988). Absent some specific statement by the legislature to the contrary, even environmental statutes are to be applied only prospectively. State Dept. v. J.T. Baker Co., 560 A.2d 739 (N.J. Super. 1989); Inmar Associates v. Borough of Carlstadt, 518 A.2d 1110, 1113 (N.J. Super. 1980), aff'd in part, 549 A.2d 38; Wilson v. Triangle Oil Co., 566 A.2d 1016 (Del. Super. 1989).

Mr. Latterner disposed of the pontoon in Medicine Lake in 1989. The disposal violation was not a "continuing offense" like maintenance of a nuisance. In the absence of a clearly stated contrary legislative intent, Laws of 1991, C. 347, Art. 1, 15 cannot be applied retroactively to his conduct.

Although the Administrative Law Judge has concluded that the civil penalty citation against Mr. Latterner must be dismissed, it is appropriate to consider other issues in the case to avoid a remand in the event that the Commissioner disagrees with the conclusion of the Administrative Law Judge regarding retroactivity. Therefore, the Administrative Law Judge has made findings and has discussed the other main issue in the case, whether Mr. Latterner or persons acting under his direction and control and for his financial benefit were responsible for abandoning the pontoon craft in Medicine Lake in 1989.

The only dispute involved in this proceeding, besides the retroactivity issue previously discussed, is whether the disabled pontoon craft depicted in PCA Ex. 6 and PCA Ex. 7 was abandoned by Mr. John Latterner in Medicine Lake. Mr. Latterner denies that he has any responsibility for the pontoon craft coming to be in Medicine Lake. All of the evidence received at the hearing, however, except for Mr. Latterner's denial, compels the conclusion that the boat was left by a Latterner work crew in 1989. Mr. Latterner does not deny that he had the contract for removing the ice-damaged dock at Medicine Lake Apartments in 1989. He did not deny Mr. Amundson's testimony that he discussed with Mr. Amundson the need to bring a watercraft to the property to remove the ice-damaged dock. Mr. Latterner does not deny that he received payment from the management company, Lake Associates, for the removal of the dock in the spring of 1989. That the pontoon that was being used became disabled is supported by the eye witness testimony of Mr. Klister, who arranged for the work crew to use a tenant's boat to complete their work. Circumstantial evidence of Mr. Latterner's responsibility for the work crew may also be found in the fact that the repairs for the damage to Ms. Atlas'

outboard motor were deducted from his invoice for the work. Finally, Officer
Jensen received corroboration of Mr. Latterner's ownership of the portoon craft from several individuals at the current dock company that has the Medicine Lake Apartment account.

Mr. Latterner's denial would only be credible if it were not his crew that actually removed the ice-damaged dock and left the pontoon boat. Mr. Latterner did not, however, deny that his crew had accomplished the work. He did not testify that the task had been subcontracted. His only explanation was that the dock had been removed without a boat using the barrel method noted in Appellant's Ex. A. He also stated that Mr. Amundson and another person had helped him remove the dock in 1989 by the hand and barrel method. He was, however, mistaken. Mr. Amundson had helped him remove a dock at the Medicine Lake Apartments in 1985 or 1986. The technique specified in Appellant Ex. A could not be used in 1989 because the dock had been severely damaged by ice. Because of the severe ice damage, a dry installation and removal system, as that depicted in Appellant Ex. A, could not be used. Mr. Latterner did not deny his conversation with Mr. Amundson in the spring of 1989, in which Mr. Amundson testified that Mr. Latterner specifically stated that a boat would be needed and that he would find something suitable, since his regular jon boat could not be used. The Agency has established by a preponderance of the evidence that either Mr. Latterner personally or a crew operating under his direction and control and for his financial benefit as part of his business abandoned a disabled pontoon boat in Medicine Lake in the spring of 1989. Conservation Officer Jensen estimated the size of the boat at approximately 25 cubic feet. If Laws of 1991, C. 347, Art. 1, 15, subd. 2(4) were applicable, the appropriate penalty would be $20.00 per cubic feet or $500.00. As previously discussed, however, it is not appropriate to apply Laws of 1991, C. 347, Art. 1, 15 retroactivity to Mr. Latterner's conduct that occurred in 1989.

B.D.C.